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The Lasting Impact of *Kokesh*: Footnote 3 and Beyond

In June 2017, the Supreme Court held in *Kokesh v. SEC*[1] that SEC disgorgement is a penalty, rather than an equitable remedy, and thus subject to the five-year statute of limitations codified in 28 U.S.C. § 2462. More than two years later, that decision continues to reverberate. Most obviously, the decision has dramatically limited the Commission's ability to obtain disgorgement. In November 2018, the SEC estimated that *Kokesh* could result in up to $900 million in foregone disgorgement for matters already filed at that point.[2]

The decision also has had other ramifications, however, as parties in scores of cases have tried — mostly without success — to extend the Court's reasoning to other SEC remedies and in non-SEC contexts. Perhaps the most significant of these decisions is the Commission's recent *In the Matter of the Application of John M.E. Saad* decision,[3] in which the full Commission forcefully rejected a challenge to permanent FINRA bars on the ground that they are "categorically punitive" and therefore impermissible under *Kokesh*. The Commission affirmed FINRA's authority to issue statutory bars that are not "excessive or oppressive" and — notably — found no reason to extend *Kokesh* to non-pecuniary sanctions authorized by statute outside the context of 28 U.S.C. §2462.

In the immediate aftermath of *Kokesh*, we predicted several potential ramifications of the decision that went well beyond the applicability of the five-year statute of limitations.[4] Now, two years later, as the decision's full reach and limitations have become more clear, we revisit some of the questions raised by *Kokesh*, including:

1) Does *Kokesh* provide a basis for challenging the SEC's power to seek disgorgement in district court proceedings at all?

2) Does *Kokesh* limit the SEC's ability to impose other sanctions?

3) Does *Kokesh* limit defendants' ability to obtain insurance coverage or indemnification for SEC disgorgement?

4) Does *Kokesh's* reasoning apply to other legal and regulatory fronts outside the context of SEC enforcement actions, including criminal proceedings?[5]

1. CHALLENGING THE SEC'S POWER TO SEEK DISGORGEMENT

Since *Kokesh* was handed down, defendants in many different cases have challenged whether, in light of *Kokesh*, the SEC is even entitled to seek disgorgement as a civil remedy in district court.[6] To date, however, no court has held that the SEC lacks this authority.

Prior to releasing its opinion in *Kokesh*, the Supreme Court seemed laser-focused on the argument that, if SEC disgorgement was a penalty, then the SEC was not authorized to seek disgorgement as an equitable remedy in the absence of an express statutory grant. During oral arguments, five different justices asked questions or made comments alluding to a perceived absence of statutory authority.[7] Additionally, at least two amicus briefs argued that the SEC cannot seek disgorgement if it is not an equitable remedy.[8] The unanimous opinion, however, left only a tantalizing disclaimer on this issue in a footnote ("Footnote 3"):

> [N]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.[9]

Although it appeared the Supreme Court was opening the door for defendants to challenge the SEC's disgorgement power, the lower courts have so far slammed it shut. That said, two developments offer potential paths for this trend to change course. One defendant has petitioned for certiorari, asking the Supreme Court to review this issue. Legislation is also pending in both houses of Congress that would effectively negate the direct holding of *Kokesh* by directly authorizing the SEC to seek disgorgement as an equitable remedy in district court actions.

A. MANY CASES, SAME RESULT

So far, the lower courts have been uniformly unwilling to let defendants rely on *Kokesh* to escape paying disgorgement to the SEC altogether. Nearly every case has cited *Kokesh* Footnote 3 to reject defendants' arguments.

Since our last client alert, published in October 2018, the Ninth Circuit cited Footnote 3 to shoot down three separate attempts to challenge the SEC's disgorgement power.[10] In each of those cases, the panel found that the Supreme Court specifically declined to consider this issue in *Kokesh* and that *Kokesh* was not "clearly irreconcilable with [the Ninth Circuit's] longstanding precedent on this subject." (One of the denials led to the appeal that we discuss in greater detail in the next section.)

District courts around the country have come to similar conclusions. So far, judges in the Southern District of New York have rejected this argument twice in 2019 alone.[11] In both cases, the court cited *Kokesh* Footnote 3 and added that, even if the Second Circuit had not expressly addressed the issue, it had continued to uphold SEC disgorgement awards since *Kokesh*. Likewise, judges in the Southern District of Florida have cited Footnote 3 on three occasions so far in 2019 to hold that the SEC had the authority to seek disgorgement.[12] Judges in the District of Massachusetts, the Southern District of California, and the District of Colorado have reached similar decisions.[13]

B. CERT PETITION TO WATCH

Notwithstanding this lack of success in the lower courts, a defendant has filed a petition for a writ of certiorari in hopes of getting a different answer from the Supreme Court. The case, *Liu v. SEC*, is an appeal from the Ninth Circuit, and the question presented is straightforward: "[w]hether the SEC may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though this Court has determined that such disgorgement is a penalty."[14]

The case began in 2016 as an SEC enforcement action in the Central District of California against Charles Liu and Xin Wang for defrauding investors in an EB-5 Immigrant Investor Program scheme. Under the EB-5 Program, foreign citizens can obtain lawful permanent residence if they make a significant investment in a U.S. commercial enterprise. The SEC alleged that Liu and Wang raised more than $27 million from investors for a purported new cancer center development that never materialized. Instead, they diverted investor money to their personal and certain other overseas accounts. The court granted the SEC summary judgment in April 2017 and ordered disgorgement of more than $26 million.

The *Kokesh* decision came down shortly before Liu's and Wang's appeal to the Ninth Circuit. In their appeal, Liu and Wang argued that, in light of *Kokesh*, SEC disgorgement was not an equitable remedy and the district court lacked statutory authority to award SEC disgorgement. The Ninth Circuit, "relying on its longstanding precedent on this subject," was unconvinced. Citing Footnote 3, the court found that "*Kokesh* expressly refused to reach this issue."[15] After the Ninth Circuit denied a petition for rehearing, Liu and Wang filed their cert petition on May 31, 2019. The SEC waived its right to respond.[16]

Whether the Court ultimately grants certiorari in *Liu* may determine how *Kokesh* Footnote 3 is interpreted going forward. Was it a way of opening a door for the Court to affirm the SEC disgorgement authority, or a hint that the Court is ready to curb the SEC's ability to obtain disgorgement entirely? The Court is set to review the petition in October 2019.

C. A POTENTIAL LEGISLATIVE FIX

With all of that backdrop, it is also quite possible the fate of Footnote 3 will not ultimately rest with the judiciary. There is now bipartisan legislation pending in both houses of Congress that would codify the SEC's ability to seek disgorgement.

In March 2019, Sens. Mark R. Warner (D-Va.) and John Kennedy (R-La.) introduced a bill that would grant the SEC the authority to seek — and federal courts to order — disgorgement, subject to the same five-year limitations period under *Kokesh*.[17] The proposed legislation would also allow the SEC to seek restitution for an investor in the amount of the loss that the investor sustained, subject to a 10-year statute of limitations.[18] Although this legislation would not overrule *Kokesh*, it would add another new and potentially very powerful tool to the SEC's enforcement toolbox by enabling the SEC to recoup investor losses, which are often far greater than a wrongdoer's ill-gotten gains (the focus of a disgorgement calculation).

Meanwhile, Rep. Ben McAdams (D-Utah) introduced a bill in the House in June 2019 that would expressly grant the SEC disgorgement authority.[19] The bill would amend Section 21(d)(5) of the Exchange Act on equitable relief and grant the SEC the express authority to seek restitution and disgorgement.[20] The draft bill states that "[a]ny equitable relief sought under this paragraph may not be construed to be a penalty" and it has already garnered support across the aisle from Rep. Bill Huizenga (R-Mich.).[21]

Although both bills have a long way to go before becoming law, they show that Congress is paying attention to this issue. It will be important to keep an eye on potential legislative efforts in this area.

2. ATTEMPTS TO EXTEND *KOKESH* TO OTHER SEC AND INDUSTRY REMEDIES

Kokesh has also prompted defense counsel to exercise their creativity. A number of theories have been offered to apply the broad reasoning of *Kokesh* to other SEC and FINRA remedies. This creativity has not yet been rewarded, however, as the Commission has emphatically rejected defendants' efforts to extend *Kokesh* in this manner.

A. *SAAD* – PERMANENT INDUSTRY BARS

In a recent decision issued on August 23, 2019, the Commission pushed back aggressively against an attempt to expand the reasoning of *Kokesh* to other remedies. The Commission's Saad opinion is the most extensive judicial or administrative opinion on the breadth of *Kokesh* since the 2017 decision was handed down.

The procedural history of *Saad* begins with FINRA, which imposed a lifetime broker-dealer industry bar as a result of misconduct. The Commission subsequently upheld that bar pursuant to Section 19(e)(2) of the Exchange Act. On appeal to the D.C. Circuit Court of Appeals, Saad claimed that, in affirming a lifetime FINRA bar, the Commission had not given due heed to his evidence of mitigating circumstances that should have avoided a lifetime bar. He also asked the D.C. Circuit to set aside the bar because it was "impermissibly punitive." Significantly, Saad did not argue before the D.C. Circuit that FINRA bars are precluded by *Kokesh*. Rather, he argued they are categorically punitive and therefore the Commission lacks the authority to affirm them under the statute giving the Commission authority to review FINRA bars, Section 19(e)(2)[22] The D.C. Circuit remanded the case for the Commission to address the "relevance — if any — of the Supreme Court's recent decision in *Kokesh v. SEC*."[23]

As a brief aside, the D.C. Circuit's review of *Saad* may provide a hint regarding how at least one member of the Supreme Court might view the *Liu* case. Current Justice Brett Kavanaugh, then a judge on the D.C. Circuit, wrote a concurring opinion in *Saad*. He reasoned that, after *Kokesh*, prior precedents holding that expulsions and suspensions are remedial are no longer good law. Applying the *Kokesh* analysis to an industry bar, Judge Kavanaugh found that the expulsion or suspension of a securities broker is a penalty and not a remedy. Significantly, however, Judge Kavanaugh's concurrence was written on an undeveloped record. *Saad* never raised the issue of whether *Kokesh* rendered an industry bar impermissible, and the D.C. Circuit remanded the issue of the applicability of *Kokesh* to the Commission for consideration in the first instance. Even though then-Judge Kavanaugh's concurrence was issued without the subject of *Kokesh's* applicability fully briefed or argued, his concurring opinion could hint at his view of the broader issue, should the Supreme Court agree to hear the *Liu* case.

In the SEC's opinion resulting from the remand of *Saad*, the Commission held that FINRA lifetime bars are permissible and that the Commission therefore had the authority to uphold *Saad*'s sanction. The decision rested on three central rationales, which we will discuss in turn: (1) Congress directly authorized bars by mandating that FINRA adopt rules providing for them in appropriate cases; (2) the Supreme Court has recognized outside the context of Section 2462 that a sanction is not necessarily punitive just because it has a deterrent purpose; and (3) FINRA bars are not penalties even under *Kokesh's* test.[24]

The Commission's first rationale was that Congress directly authorized FINRA to have disciplinary authority, including to issue industry bars and gave the Commission authority to review sanctions imposed by FINRA to ensure they are not impermissibly punitive and thus excessive or oppressive. For this reason, the Commission found:

> It is nonsensical to say that a sanction Congress explicitly authorized – complete with a test to determine its permissibility in each case – is always punitive, rendering it categorically impermissible under that same congressional scheme.

As discussed in the opinion, "the Commission and the courts have long held that FINRA sanctions imposed pursuant to this authority are permissible only so long as the sanctions are designed not to punish offenders but to protect investors and the public interest."[25] The statutory scheme, the Commission concluded, contemplates that FINRA will impose bars and that, when these bars are challenged, the Commission has authority to determine if the bar is impermissibly punitive. This necessarily objective inquiry, the Commission reasoned, rests on the purpose of the bar, and specifically whether it is issued for remedial or punitive purposes. The Commission further noted that Congress granted FINRA the authority to issue remedial sanctions that focus on protecting investors and the public interest, but not punitive sanctions that punish the offender. The Commission found this inquiry was separate and distinct from the *Kokesh* inquiry into whether a sanction fell within the meaning of Section 2462, and therefore the additional analysis applied in *Kokesh* did not need to be considered in the context of a FINRA bar.[26]

The Commission's second rationale was that the Supreme Court has recognized that nonpecuniary sanctions, such as bars, are not punitive solely because they are deterrent and that to decide otherwise would be inconsistent with Court precedent. The Commission emphasized that the Supreme Court, the D.C. Circuit, and other Circuits have recognized debarments as remedial because they protect the public.[27] While *Kokesh* held that a sanction is punitive for Section 2462 purposes if "it cannot fairly be said *solely* to serve a remedial purpose," the Commission did not view this conclusion as bearing on FINRA bars and other nonpecuniary sanctions.[28] The Commission noted that the entire discussion in *Kokesh* was framed around the idea of pecuniary sanctions operating as a penalty, with the Court drawing a distinction between pecuniary sanctions imposed as deterrence versus those imposed in a compensatory manner. Here, however, the Commission determined that such a distinction is inapplicable, because bars do not serve a monetary purpose, and therefore there is no distinction to draw on the basis of compensating victims. The Commission reasoned that *Kokesh* should be confined to the sole question presented to the Court, which did not involve a consideration of nonpecuniary sanctions.[29]

The Commission also considered *Saad*'s argument based on the "solely remedial" test in the context of other Supreme Court precedents. The Commission noted that the *Kokesh* test cited by *Saad* is derivative of *United States v. Halper*, a case that considered pecuniary civil sanctions and the Double Jeopardy Clause. *Halper* held that sanctions that cannot fairly be said solely to serve a remedial purpose are punishment.[30] The Commission rejected Saad's reliance on this test, however, explaining that the Court had overturned *Halper* in *Hudson v. United States*, in which it deemed this test "unworkable" for determining whether a civil sanction is "punitive" for Double Jeopardy purposes. The Court added that, if "the mere presence of a deterrent purpose render[ed] such sanctions 'criminal' for double jeopardy purposes," this would "severely undermine" the Government's ability to regulate institutions.[31] The Commission rejected the use of *Halper's* "solely remedial" standard for deeming a bar punitive, because, as stated in *Hudson*, any civil penalty is going to have some deterrent effect.

The Commission's third and final rationale for its decision was that, even if it applied the *Kokesh* test, FINRA bars are not necessarily punitive and therefore are not prohibited. The Commission reasoned that courts have "recognized that a sanction is not rendered punitive merely because it can be explained as serving a deterrent purpose. Rather, these courts have held that a sanction is properly described as punitive if it can *only* be explained as serving a deterrent purpose." [32] The opinion then undertook the fact-specific analysis required under the *Kokesh* test and concluded that there is "no question" that this bar is a remedial measure, given the need to protect investors from Saad's dishonest character that it deemed "wholly inconsistent with the high standards demanded of securities professionals."[33]

B. *BRUTON* – TEMPORARY 102(E) SUSPENSIONS

Before its decision in *Saad*, the Commission also had rejected a similar argument that temporary suspensions under Rule 102(e) were impermissible in the wake of *Kokesh*. In *In the Matter of Karen Bruton*, the SEC instituted an administrative proceeding and imposed a temporary suspension from practicing before the SEC against Bruton on the basis of the entry of a final judgment, by consent,[34] that enjoined her from violating the antifraud provisions under the Investment Advisers Act of 1940.[35] Bruton, who held a CPA license that had been inactive for over a decade, petitioned the Commission to lift the suspension on the basis that Rule 102(e) allows only remedial and not punitive sanctions.[36] Bruton argued that the temporary suspension was punitive in light of *Kokesh's* penalty analysis because one of its purposes was to deter others from disregarding their professional responsibilities, and so — like SEC disgorgement — it was not "solely" remedial.[37]

The Commission rejected this argument, on the grounds that a temporary suspension under Rule 102(e)(3) served a solely remedial purpose. The Commission's opinion stated that *temporarily* suspending an accountant who had been enjoined from violating the federal securities laws was not designed to deter others from committing misconduct, but rather to protect the public pending the outcome of a hearing to determine what, if any, sanction was appropriate. The Commission distinguished this situation from its decision in *Michael C. Pattison*, CPA¸ where it had stated that one of the purposes of *permanently* barring an accountant from appearing or practicing before the Commission was to "deter others from disregarding their professional responsibilities."[38] The Commission held that Bruton and the Division of Enforcement could make arguments about whether *Kokesh* or *Pattison* impacted any final sanction that could be imposed during the underlying administrative hearing. As of today, a decision on the Enforcement Division's Motion for Summary Judgment, as well as Bruton's opposition in which she reiterated the arguments that she made before the Commission, is still pending.

3. INSURANCE AND INDEMNIFICATION

Another consequential implication of *Kokesh* for the private sector is that it has provided a basis for insurers to refuse coverage for disgorgement. Insurance policies have generally prohibited the insured from obtaining reimbursement or indemnification for "penalties," but until *Kokesh*, disgorgement was not classified as a penalty. After *Kokesh*, insurers were quick to argue that they should not have to indemnify or reimburse policyholders for SEC disgorgement.[39] This issue came to a head when a panel of the New York Appellate Division reversed a lower court decision and held that SEC disgorgement, because it is a penalty, is uninsurable in New York as a matter of public policy.[40]

Unfortunately for defendants, this trend has continued in the federal courts. In *Marcus v. Allied World Insurance*, the court sided with an insurer that refused to defend an SEC enforcement action against a lawyer and his law firm on the basis that the SEC's claim for disgorgement was not included within the policy's coverage of damages.[41] The SEC accused the lawyer of helping perpetuate his client's fraudulent investment scheme and sought disgorgement of all legal fees collected in the course of the representation. The law firm's professional liability insurer declined to defend the suit because the policy excluded coverage for "the return or restitution of legal fees."[42] The lawyer sued, arguing that under SEC disgorgement principles, if he were to be found jointly liable alongside his client, he could be forced to disgorge an amount exceeding what he collected in attorneys' fees. The court acknowledged that *Kokesh* contemplated this type of "excess disgorgement."[43] Nevertheless, the insurer argued, and the court agreed, that even if the disgorgement that ultimately was ordered against the lawyer exceeded the legal fees he had collected, it should still be classified as a "penalty" after *Kokesh*, and penalties were also not covered by the policy.[44] The court stated that even though *Kokesh* was interpreting a federal statute of limitations, and not an insurance policy, the decision's reasoning was "broad and persuasive."[45]

4. OTHER FEDERAL AGENCY REMEDIES

Defendants have also argued that *Kokesh's* reasoning should apply to other federal agencies seeking to recover ill-gotten gains. As shown below, courts have largely rejected this argument, although one court recently agreed with the concept of extending *Kokesh* to the context of a Federal Energy Regulatory Commission ("FERC") action to obtain court affirmation of civil penalties that FERC had already assessed.

A. FTC AND FERC ACTIONS

In *FTC v. AMG Capital Management*, the Federal Trade Commission ("FTC") filed suit against Scott Tucker and his payday loan businesses for allegedly misleading borrowers on loan terms.[46] The FTC sought disgorgement of ill-gotten gains and won at the summary judgment stage. The defendants appealed, arguing to the Ninth Circuit that the district court lacked the authority to order disgorgement because the FTC Act only permits the FTC to obtain equitable relief and disgorgement is not equitable in light of *Kokesh*. The panel acknowledged that defendants' argument "has some force," but found the argument did not reach the required threshold of "clearly irreconcilable" in order for the panel to overturn prior Ninth Circuit authority.[47] The panel specifically cited to *Kokesh* Footnote 3, which "expressly limits the implications of the decision."[48] The court also found that the monetary judgment in the case was not a penalty under *Kokesh* because the FTC sought the relief solely to compensate consumers and had already sent them a significant amount in refunds. Similarly, the court observed that, in recent years, the Commission had distributed more than 99% of the funds recovered and therefore compensatory awards such as this were not penalties as found in *Kokesh*. In this vein, the outcome of this case resembles the other three Ninth Circuit cases, discussed above, that cited Footnote 3 as a basis for refusing to extend *Kokesh*. More recently, a district court in Florida reached a similar conclusion in another FTC disgorgement matter.[49]

In one holding contrary to this trend, however, the U.S. District Court for the District of Maine recently agreed to extend *Kokesh*'s reasoning to the FERC context.[50] In *FERC v. Silkman*, FERC filed a petition seeking a court order affirming FERC's assessment of certain civil monetary penalties. One core issue in the case was whether FERC's claim for court affirmation accrued at the time FERC assessed penalties at issue, or at the time the underlying violative conduct had occurred several years earlier. Ruling on summary judgment motions by the parties, the court concluded that "the *Kokesh* holding with regard to SEC penalties applies with equal force to FERC penalties. As such, the entire penalties assessed by FERC, including disgorgement, are subject to the statute of limitations under § 2462."[51] The *Silkman* court went on, however, to hold that FERC's penalty-affirmation action was not time-barred. The claim did not accrue until the point at which FERC assessed the civil penalties.[52] The posture of this case — to enforce penalties already assessed by an agency — arguably leaves room to distinguish it against cases alleging the substantive violations. That said, it is the first case we have seen that agreed to extend *Kokesh* beyond the context of SEC enforcement actions.

B. ERISA ACTIONS

Kokesh has also been raised in a case brought under the Employee Retirement Income Security Act ("ERISA"), a federal law designed to regulate companies providing retirement or health plans. In *Pension Benefit Guardian Corp. v. Mizrachi*, the trustee of a retirement plan sued the former trustees for ERISA violations relating to allegedly making improper loans using the plan's funds.[53] The new trustee sought to restore those misappropriated funds to the plan. The defendants filed a motion to dismiss the complaint, arguing that claims were time barred because the relief sought was a penalty under *Kokesh* and thus subject to a five-year statute of limitations. The court held that "*Kokesh* does not impose an additional, unwritten cap on ERISA's already clear statute of limitations."[54] In bolstering this conclusion, the court reviewed the "three hallmarks" in *Kokesh* that make SEC disgorgement a penalty, and then distinguished each of them from the facts of this case. Most importantly to the court, the new trustee primarily sought damages to compensate plan participants, and not to punish the defendants for a violation of public laws.[55]

C. DENATURALIZATION PROCEEDINGS

Finally, a group of defendants facing denaturalization invoked *Kokesh* to argue that denaturalization is a penalty and can thus be barred by the five-year statute of limitations in § 2462. This argument has appeared in four cases in the past year, but it has yet to persuade a court. The first instance was *United States v. Phattey*, where a man facing denaturalization filed a motion for summary judgment arguing that the government's claim was time barred.[56] The court rejected the defendant's argument, holding that even if denaturalization has a deterrent effect, its purpose is not to deter or to punish. Rather, the purpose of denaturalization is "to take back something that was not deserved in the first place ... to restore the status quo."[57] District courts in Kansas and Florida reached similar conclusions.[58]

5. INVOKING *KOKESH* IN CRIMINAL PROCEEDINGS

The last category of cases involves defendants in criminal proceedings invoking *Kokesh* to argue their double jeopardy rights have been violated or that the catchall statute of limitations should apply. As with the other attempts to extend *Kokesh* discussed above, courts have not been receptive to these arguments.

A. DOUBLE JEOPARDY

The Double Jeopardy Clause prohibits multiple criminal punishments for the same offense.[59] In two recent cases, defendants have argued that, in light of *Kokesh*'s penalty analysis, courts should classify SEC disgorgement as a criminal punishment and thus preclude criminal prosecution after disgorgement has been ordered. This argument has yet to succeed.

In *United States v. Dyer*, two brokers accused of defrauding investors were the subject of simultaneous criminal and SEC civil enforcement actions.[60] They pled guilty to the criminal charges and settled the civil case, consenting to disgorgement and a civil penalty. In their civil settlement, the defendants waived any future claim of double jeopardy, including from the imposition of any remedy or civil penalty.[61] During sentencing in the criminal case, the defendants received an 18-level increase in their sentencing calculations — and consequently a longer prison sentence — because the amount of loss caused by their conduct was greater than $3,500,000. The defendants appealed their criminal sentences on the grounds that they were criminally punished twice for their conduct — through disgorgement in the civil case and the 18-level increase in their criminal sentencing calculations.

The Sixth Circuit upheld the sentences, adopting the pre-*Kokesh* reasoning of several other circuit courts in refusing to classify SEC disgorgement as a criminal punishment.[62] The court held that "nothing in *Kokesh* suggests that the Court considered SEC disgorgement to be a criminal punishment" and that it would not "read between the lines" of *Kokesh*.[63] Even though *Kokesh* described disgorgement as a penalty imposed for deterrent purposes, the "'mere presence of [a deterrent] purpose' does not make a sanction criminal for Double Jeopardy purposes."[64] The Court did not consider the issue of whether Dyer had properly waived his claim of double jeopardy in the SEC consent judgment. The Court reasoned that although the Government had raised the waiver issue at the district court level it had not pursued the waiver issue on appeal, and thereby had forfeited it.[65] The Supreme Court denied Dyer's cert petition in April 2019.[66]

Similarly, in *United States v. Bank*, a defendant accused of perpetuating a scheme to defraud investors filed a motion to dismiss his indictment, arguing that *Kokesh* barred the criminal action because he had already been criminally punished through disgorgement in the parallel SEC civil enforcement action.[67] The Government argued that the defendant expressly waived a double jeopardy claim in the settlement of the civil case and that, even if he did not, SEC disgorgement is a civil — not a criminal — punishment. The court found that the double jeopardy waiver in the civil settlement by itself did not bar defendant's claim because (1) it was signed prior to *Kokesh*, meaning the defendant may not have intentionally relinquished a known right, and (2) its language, though broad, did not make specific reference to criminal proceedings.[68]

Nevertheless, the court denied the defendant's motion.[69] The court used the two-step *Hudson* analysis to find that *Kokesh* did not transform SEC disgorgement into a criminal punishment.[70] *Hudson* restored the pre-*Halper* double jeopardy analysis whereby a court must evaluate whether a statutory punishment is civil or criminal for double jeopardy to apply as the clause only protects against multiple criminal punishments for the same offense.[71] *Hudson* revived the *United States v. Ward* two step test: first, whether the legislature expressed or implied the penalty was civil or criminal and second, if the legislature signaled a civil penalty, if it was "so punitive either in purpose or effect" to "transform … into a criminal penalty."[72] Under the first step, the court concluded that Congress expressed an implied preference for disgorgement to be considered "civil" rather than criminal. Under the second step, the court examined the seven factors considered in *Hudson* and held that "while *Kokesh* declared disgorgement a punishment for certain purposes, it did not sufficiently … 'override legislative intent' and transform the civil penalty of disgorgement into a criminal punishment that triggers Double Jeopardy."[73] The Commission's recent decision in *Saad*, as discussed above, reaffirmed *Hudson's* analysis and its applicability to nonpecuniary sanctions.

B. STATUTE OF LIMITATIONS

Finally, in *Reed v. United States*, a former district attorney was convicted of misuse of campaign funds, underreporting income on tax returns, and mail fraud in a continuing scheme over two decades.[74] He was sentenced to four years in prison and was ordered to forfeit $609,217. He appealed the decision on several grounds, including that *Kokesh* imposed a five-year statute of limitations for recovery of ill-gotten gains. The Fifth Circuit upheld the forfeiture amount, holding that *Kokesh* concerned only the civil forfeiture statute, not criminal forfeiture as was ordered in this case.[75] Therefore, the five-year limitations period at issue in *Kokesh* did not apply. The Supreme Court denied Reed's cert petition in May 2019.[76]

6. CONCLUSION

In the days following the landmark *Kokesh* decision, we wrote that it could have implications reaching far beyond the narrow holding that SEC disgorgement was a penalty and thus subject to a five-year statute of limitations.[77] Now, two years later, answers to certain questions raised by the decision have begun to emerge.

While defendants have tested the limits of *Kokesh* creatively, its current reach appears limited to the applicability of a five-year statute of limitations for SEC disgorgement. This limit could be breached if the Supreme Court accepts the *Liu* cert. petition and agrees to hear whether disgorgement is a remedy available to the SEC in any form. And, as the *Saad* and *Bruton* cases demonstrate, there is likely to be continued litigation over whether *Kokesh* applies to other nonpecuniary remedies, such as suspensions and bars. Although the SEC forcefully drew a line in *Saad*, seeking to limit *Kokesh* to disgorgement — both based on its statutory authority to issue and review sanctions and on a narrow reading of *Kokesh* — the SEC's efforts to cabin *Kokesh* could be further challenged if Saad again appeals to the D.C. Circuit.

Litigants have also continued to make creative arguments for extending *Kokesh* into areas beyond the realm of the SEC. Without clear delineation between remedies and penalties, we will likely see more challenges under the fact-specific analysis used in *Saad* and *Johnson*. Furthermore, insurers have successfully relied upon *Kokesh* to deny coverage for disgorgement, proving that the Supreme Court's holding was not universally favorable for defendants. And finally, legislative actions by Congress may address some of these issues. As a result, it seems clear the full reach of *Kokesh* is still to be determined.

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[1] Kokesh v. SEC, 137 S. Ct. 1635 (2017).
[2] 2018 SEC DIV. ENFORCEMENT ANN. REP. 5.
[3] In re Saad, Exchange Act Release No. 86751, 2019 WL 3995968 at 4 (Aug. 23, 2019).
[4] Dixie L. Johnson, Carmen Lawrence, M. Alexander Koch, Matthew H. Baughman, Jessica L.K. Rapport, Hap Shashy & Gregory S. Lucas, *Reflections on Kokesh v. SEC: Potential Ramifications of SEC Disgorgement Being a Penalty*, King & Spalding Client Alert, June 14, 2017; *See also* Dixie L. Johnson & M. Alexander Koch, *Reflections on Kokesh v. SEC; Potential Ramifications of SEC Disgorgement Being a Penalty*, The Corporate Counselor (Volume 32, No. 5, Aug. 2017) (Part 1 of 2); Dixie L. Johnson, Hap Shashy & M. Alexander Koch, *Reflections on Kokesh v. SEC; Potential Ramifications of SEC Disgorgement Being a Penalty*, The Corporate Counselor (Volume 32, No. 6, Sept. 2017) (Part 2 of 2).
[5] The authors would like to thank King & Spalding summer associate Scott Hiers for his extensive assistance in the research and early drafting stages of this piece.
[6] See K&S Client Alert, supra note 4, at 3-5. The SEC has statutory authority to order disgorgement in cease-and-desist proceedings under Section 21C (e) of the Securities Exchange Act. See 15 U.S.C. § 78u-3(e) (2018).
[7] Chief Justice Roberts and Justices Kennedy, Alito, Sotomayor and Gorsuch all asked questions on this subject. Transcript of Oral Argument at 7, 13, 15-16, 31-33, 52, Kokesh v. SEC, WL 2407471 (U.S. Apr. 18, 2017) (No. 16-529).
[8] *See* Brief for Mark Cuban as Amici Curiae in Support of Petitioner, Kokesh v. SEC, WL 2407471 (U.S. Apr. 18, 2017) (No. 16-529); Brief for Americans for Forfeiture Reform as Amicus Curiae in Support of Petitioner, Kokesh v. SEC, WL 2407471 (U.S. Apr. 18, 2017) (No. 16-529).
[9] *Kokesh*, 137 S. Ct. at 1642 n.3.
[10] See SEC v. Liu, 754 F. App'x 505 (9th Cir. 2018); SEC v. Hooper, No. 17-35835, 2019 WL 1952810 (9th Cir. Apr. 30, 2019); SEC v. Weaver, No. 17-56423, 2019 WL 2024360 (9th Cir. May 8, 2019) (affirming in part SEC v. Jammin Java Corp., No. 215CV08921SVWMRWX, 2017 WL 4286180 (C.D. Cal. Sept. 14, 2017)).
[11] SEC v. Rio Tinto PLC, 2019 WL 1244933 (S.D.N.Y. Mar. 18, 2019); SEC v. Berkey, 2019 WL 1716703 (S.D.N.Y. Apr. 18, 2019).
[12] SEC v. 1 Glob. Capital LLC, No. 18-cv-61991, 2019 WL 1670799 (S.D. Fla. Feb. 7, 2019) (surveying other district court decisions and finding that "[p]ost-Kokesh, no court has been persuaded that disgorgement is no longer an appropriate remedy in an SEC enforcement action"); United States v. Meyer, No. 18-CV-60704, 2019 WL 1759352 (S.D. Fla. Mar. 21, 2019) (citing *Kokesh* Footnote 3 to reject defendant's argument that *Kokesh* should be read to limit the disgorgement proceedings under § 7402, in addition to § 2462); CFTC v. S. Tr. Metals, Inc., No. 1:14-CV-22739-JLK, 2019 WL 2295488 (S.D. Fla. May 30, 2019) (citing *Kokesh* Footnote 3 to reject defendants' argument that their expenses should be accounted for in the disgorgement calculation).
[13] Jalbert v. SEC, 327 F. Supp. 3d 287 (D. Mass. 2018) (dismissing a class action brought by bankruptcy trustee seeking to force the SEC to return disgorgement because *Kokesh* "specifically noted" that it did not "change[] disgorgement law as to civil enforcement proceedings"); SEC v. Flowers, No. 17cv1456-JAH (JLB), 2018 WL 6062433 (S.D. Cal. Nov. 16, 2018) (holding that *Kokesh* Footnote 3 preempted defendant's argument and that "just because something is a penalty for purposes of § 2462 does not mean it is a penalty for other purposes"); SEC v. Camarco, Civil Action No. 17-cv-2027-RBJ, 2018 WL 6620878 (D. Colo. Dec. 18, 2018) (surveying existing caselaw and finding that at least 15 district courts have held that *Kokesh* did not overrule existing precedent that disgorgement is an authorized remedy).
[14] Petition for Writ of Certiorari, SEC v. Liu, No. 18-1501 (May 31, 2019).
[15] *Liu*, 754 F. App'x at 509.
[16] Docket, SEC v. Liu, No. 18-1501 (last visited June 27, 2019).
[17] Press Release, Sen. Mark R. Warner, *Warner & Kennedy Introduce Bill to Help Investors Harmed by Fraud* (Mar 14, 2019).
[18] Securities Fraud Enforcement and Investor Compensation Act, S. 799, 116th Cong. (2019).

[19] *Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators Before the Subcomm. on Inv'r Prot., Entrep. and Capital Mkts. of the H. Comm. on Fin. Servs.*, 116th Cong. (2019).
[20] To Amend the Securities Exchange Act of 1934 to Allow the Securities and Exchange Commission to Seek and Federal Courts to Grant Restitution to Investors and Disgorgement of Unjust Enrichment, 116th Cong. (2019) (discussion draft).
[21] *Id.* Patrick Temple-West, *Republicans Back Move to Help SEC Recoup Cash for Harmed Investors*, POLITICO (June 19, 2019).
[22] The Commission is tasked with reviewing whether sanctions imposed by FINRA are improperly excessive or oppressive under Section 19(e)(2), with the key inquiry being if the sanction is based on "due regard for the public interest and the protection of investors." If a sanction is improperly excessive or oppressive, then the Commission may not affirm it.
[23] Saad v. SEC, 873 F. 3d 297 (D.C. Cir. 2017); Dixie Johnson, Alec Koch, Carmen Lawrence, Abraham Shashy, Richard Walker, Jessica Rapoport and Gregory Lucas, *The Impact of Kokesh So Far, And What's Next: Part 2*, Law360 (Feb. 2018), https://www.kslaw.com/attachments/000/005/655/original/2-14-18_Law360.pdf?1518640833.
[24] In re Saad, Exchange Act Release No. 86751, 2019 WL 3995968 at 4 (Aug. 23, 2019).
[25] *Id.* at 5 (citing Exchange Act Section 15A(b)(7), 15 U.S.C. § 78o-3(b)(7) (2010)).
[26] The Commission supported this rationale by explaining that the determination of whether a bar is remedial or punitive (and therefore excessive or oppressive) is a fact-specific determination, not a bright-line rule. In re Saad, Exchange Act Release No. 86751, 2019 WL 3995968 at 6-7 (Aug. 23, 2019) (pointing to *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), as an example of finding that a suspension was punitive). The Commission also reasoned that *Kokesh* said nothing about nonpecuniary sanctions, and therefore, applying the same standards to this separate and distinct type of sanction would be improper.
[27] *Id.* at 3-4 (citing Hawker v. People of New York, 170 U.S. 189, 200 (1898); Helvering v. Mitchell, 303 U.S. 391, 399 & n.2 (1938); PAZ SECs., Inc. v. SEC, 494 F.3d 1059, 1065-66 (D.C. Cir. 2007); West v. SEC, 641 F. App'x 27, 30 (2d Cir. 2016)).
[28] Kokesh v. SEC, 137 S. Ct. 1635, 1644-45 (2017).
[29] In re Saad, Exchange Act Release No. 86751, 2019 WL 3995968 at 12 (Aug. 23, 2019).
[30] 490 U.S. 435, 449 (1989). Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (whether sanction appears excessive in relation to its non-punitive purpose is relevant to determination whether sanction is civil or criminal).
[31] *See* 522 U.S. 93, 101-02 (1997).
[32] In re Saad, Exchange Act Release No. 86751, 2019 WL 3995968 at 16 (Aug. 23, 2019).
[33] *Id.* Compare with *Johnson v. SEC*, in which the D.C. Circuit found the bar was punitive, rather than remedial. 87 F.3d 484 (D.C. Cir. 1996).
[34] See 17 C.F.R. §201.102(e)(3)(i), which allows "The Commission, with due regard to the public interest and without preliminary hearing, may, by order, temporarily suspend from appearing or practicing before it any attorney, accountant, engineer, other professional" who has been "found by the Commission in any administrative proceeding to which he or she is a party to have violated…or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder." Any person temporarily suspended under this provision may, within 30 days after service of the suspension order, petition the Commission to lift the temporary suspension. If no petition is received within 30 days, the suspension becomes permanent.
[35] In re Karen Bruton, Exchange Act Release No. 84198, 2018 WL 4488869 (Sept. 19, 2018).
[36] *Id.*
[37] *Id.*
[38] In re Michael C. Pattison*, CPA*, Exchange Act Release No. 67900, 2012 WL 4320146 at *12 (Sept. 20, 2012).
[39] *The Catch with Kokesh: Insurers Refusing to Cover Disgorgement to SEC*, King & Spalding Client Alert, Oct. 23, 2018.
[40] J.P. Morgan Sec. Inc., v. Vigilant Ins. Co., 2018 NY Slip Op 06146, No. 600979/2009 (1st Dept. Sept. 20, 2018).
[41] No. 2:18-CV-253-DBH, 2019 WL 1810954, at *2 (D. Me. Apr. 23, 2019).
[42] *Id.* at *2.
[43] *Id.* at *2-3.
[44] The insurance policy excluded coverage for "penalties (statutory or otherwise)." *Id.*
[45] The court held separately that the insurer had a duty to defend a subsequent class action in light of the insurer's policy investment advice exclusion. *See id.* at *6.
[46] 910 F.3d 417 (9th Cir. 2018).
[47] *Id.* at 426-27.
[48] *Id.* at 427.
[49] FTC v. Simple Health Plans LLC, No. 18-cv-62593, 2019 WL 2119675, at *1 (S.D. Fla. May 14, 2019) (citing *Kokesh* Footnote 3 to argue that the holding in *Kokesh* was a narrow one that did not foreclose the FTC from seeking disgorgement).
[50] FERC v. Silkman, 359 F. Supp. 3d 66 (D. Me. 2019).
[51] *Id.* at 116.
[52] *Id.* at 119–122 (holding the action not time barred under the 28 U.S.C. § 2462 five year statute of limitations, as it began to accrue when FERC assessed the penalty and not as of the violation).
[53] 363 F. Supp. 3d 342 (E.D.N.Y. 2019).
[54] *Id.* at 344.
[55] *Id.* at 343-44.
[56] No. 3:17-cv-247 JWS, 2018 WL 4365490 (D. Alaska Sep. 12, 2018).
[57] *Id.* at *9-10.
[58] United States v. Malik, No. 15-9092-CM, 2019 LEXIS 66354 (D. Kan. Apr. 17, 2019); United States v. Njagi Muthara, No. 15-9091, 2019 WL 1762877, at *2 (D. Kan. Apr. 22, 2019); United States v. Borgono, No. 18-21835-Civ, 2019 WL 2436279, at *5 n.5 (S.D. Fla. June 11, 2019).
[59] Hudson v. United States, 522 U.S. 93, 98-99 (1997).

[60] 908 F.3d 995, 998 (6th Cir. 2018).
[61] As previously discussed, the SEC began requiring defendants to waive their double jeopardy claims after *United States v. Halper*, 490 U.S. 435 (1989). However, Halper was overruled by *Hudson v. United States*, 522 U.S. 93 (1997), which restored the pre-Halper double jeopardy analysis. Hudson rejected Halper's "solely remedial" test in civil sanctions cases in part because all civil penalties have some deterrent effect.
[62] 908 F.3d 995, 1003 (6th Cir. 2018).
[63] *Id.* at *1001. The court stated in dicta that even if SEC disgorgement were a criminal punishment, it would have still affirmed the sentences because (1) elements of the causes of action for the civil case (securities violations) and the criminal case (conspiracy) were mutually exclusive and (2) the consideration of a sentence enhancement based on defendants' relevant conduct is not "punishment." *Id.* at 1004.
[64] *Id.* at 1003 (quoting *Hudson*, 522 U.S. at 105).
[65] *Id.* at 999.
[66] Dyer v. United States, 139 S. Ct. 1610 (2019)
[67] 378 F. Supp. 3d 451 (E.D. Va. 2019).
[68] *Id.* at 454.
[69] *Id.* at 467.
[70] *Id.* at 456 (citing *Hudson*, 522 U.S. at 100).
[71] Hudson v. United States, 522 U.S. 93, 98 (1997).
[72] *Id*. at 99 citing Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956). The *Hudson* court added "In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963), provide useful guideposts." *Id.* at 100 citing *Ward*, 448 U.S. 242, 249 (1980).
[73] *Bank*, 378 F. Supp. 3d, at 467.
[74] United States v. Reed, 908 F.3d 102, 109 (5th Cir. 2018).
[75] *Id.* at 125-26.
[76] Reed v. United States, No. 18-1336, 2019 U.S. LEXIS 3671 (May 28, 2019).
[77] *See* K&S Client Alert, *supra* note 4, at 1.